IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 22ND AUGUST 2007 / 31ST SRAVANA 1929

Bail Appl..No. 5181 of 2007()

CRIME NO. 228/05 OF SANTHANPARA POLICE STATION, IDUKKI
CRMP.3109/2007 of DISTRICT COURT, THODUPUZHA

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PETITIONERS: 1ST & 3RD ACCUSED:

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1. BIJU @ MEDAN BIJU, AGED 30 YEARS,
PORAKKUNNEL HOUSE, THALAYANKAVUKARA,
CHATHURANPARA VILLAGE.

2. BHASKARAN, S/O. NARAYANAN,
AGED 52 YEARS, NARIYANICKAL HOUSE,THALAYANKAVUKARA
CHATHURANPARA VILLAGE,NOW RESIDING AT RENTAL HOUSE
NO.243, OWNED BY LALICHAN, WARD VI, SENAPATHY
PANCHAYATH.

BY ADV. SMT.NAINA RAJI NAIR

RESPONDENTS:

STATE OF KERALA,
SUB INSPECTOR OF POLICE, SANTHANPARA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. JAI GEORGE

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 22/08/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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B.A.No. 5181 of 2007

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Dated this the 22nd day of August, 2007

O R D E R

Application for anticipatory bail. The petitioners are accused 1 and 3. Altogether there are three accused persons. The crux of the allegations against the petitioners is that they on 25.8.2005 were found in possession of 2 litres of arrack and 300 litres of wash along with the implements for distillation. The petitioners were not arrested in the course of investigation. Investigation is now complete. Final report has already been filed. Cognizance has been taken by the learned Magistrate. Committal proceedings has been registered also.

2. The learned counsel for the petitioners submits that the petitioners are absolutely innocent. Their absence was not wilful, but was due to reasons beyond their control. The petitioners are willing to appear before the learned Magistrate, but they apprehend that their applications for bail may not be considered by the learned Magistrate on merits, in accordance with law and expeditiously. The counsel therefore prays that directions under Section 438 and/or 482 Cr.P.C. may be issued in favour of the petitioners.

3. The learned Prosecutor opposes the application. He submits that the petitioners may be directed to appear before the Investigator or the learned Magistrate and then seek regular bail in the normal course.

4. I find merit in the opposition by the learned Prosecutor. It is trite after the decision in **Bharat Chaudhary** v. **State of Bihar** (AIR 2003 SC 4662) that powers under Section 438 Cr.P.C. can be invoked even in favour of a petitioner, who apprehends arrest in the pending case on the strength of a non-bailable warrant issued by the court. Even that is not by itself sufficient to justify the invocation of the jurisdiction under Section 438 Cr.P.C. I am unable to find any compelling reasons which would justify invocation of the jurisdiction under Section 438 Cr.P.C.

5. It is certainly for the petitioners to appear before the learned Magistrate and explain to the learned Magistrate the circumstances under which they could not earlier appear before the learned Magistrate. I have no reason to assume that the learned Magistrate would not consider their applications for bail to be filed by the petitioners when they surrender before the learned Magistrate, on merits, in accordance with law and expeditiously. Every court must do the same. No special or specific direction appears to be necessary. Sufficient general directions have

already been issued by this Court in the decisions in **Sukumari** v. **State of Kerala** (2001 (1) KLT 22) and **Alice George** v. **Dy.S.P. of Police** (2003 (1) KLT 339).

6. This application is accordingly dismissed. I may however hasten to observe that if the petitioners appear before the learned Magistrate and apply for bail after giving sufficient prior notice to the Prosecutor in charge of the case, the learned Magistrate must proceed to pass orders on merits, in accordance with law and expeditiously - on the date of surrender itself.

(R. BASANT)
Judge

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